

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA DEAN HAVEMAN,

Defendant-Appellant.

UNPUBLISHED

December 22, 2011

No. 301543

Allegan Circuit Court

LC No. 09-016354-FH

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant pleaded guilty of assault with intent to commit criminal sexual penetration, MCL 750.520g(1). The trial court sentenced him to a prison term of 34 to 120 months. Defendant appeals as of right, challenging only the scoring of certain offense variables (OVs). We affirm.

Defendant's plea arose out of incidents that followed his theft of a laptop computer. Defendant was arrested for the theft, and in the process of searching the stolen computer police officers discovered a video of defendant engaging in sexual intercourse with the victim, his 15-year-old girlfriend. In addition to the video, officers also discovered several photographs of the victim engaging in sexually explicit activities. Defendant was charged with two counts of third-degree criminal sexual conduct, MCL 750.520d; one count of possessing child sexually abusive material, MCL 750.145c(2); and one count of inducing a child to engage in sexually abusive activity, MCL 750.145c(4)(a). Defendant pleaded guilty to one count of assault with intent to commit criminal sexual penetration; the rest of the charges were dismissed.

As relevant to this appeal, the trial court scored ten points for OV 4, 50 points for OV 11, and 25 points for OV 13. Defendant preserved his challenges to OV 11 and 13 by objecting to the trial court's scoring decisions at his sentencing hearing. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). When the issue is preserved, "[t]his Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "A trial court's scoring decision 'for which there is any evidence in support will be upheld.'" *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), quoting *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Because defendant failed to object to the scoring of OV 4, review is

limited to plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that the trial court erred in scoring 50 points for OV 11. MCL 777.41 provides that OV 11 is to be scored at 50 points where two or more criminal sexual penetrations occurred. It also states in relevant part:

(2) All of the following apply to scoring offense variable 11:

(a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.

(b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13. [MCL 777.41(2).]

Thus, in order to properly score 50 points under OV 11, the trial court must find that two or more criminal sexual penetrations occurred, and that those instances of penetration “arose out of the sentencing offense.” MCL 777.41(1); MCL 777.41(2)(a). Here, the record demonstrates that defendant committed both penile and digital penetration of the victim during the videotaped sexual encounter. The record also demonstrates that the penetrations arose out of the sentencing offense because they occurred at the same time and during the same course of conduct as the sentencing offense. See *People v Mutchie*, 251 Mich App 273, 277-278; 650 NW2d 733 (2002) (acts that occur at the same time and place as the sentencing offense, and during the course of the sentencing offense, arise out of the sentencing offense). Accordingly, there was evidence to find that two criminal sexual penetrations arose out of the sentencing offense. The trial court correctly scored 50 points under OV 11. *Steele*, 283 Mich App at 490.¹

Defendant next contends that the trial court erred in scoring 25 points for OV 13. OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43. If the offense being scored was part of a pattern of felonious criminal activity involving three or more crimes against a person, the trial court must score OV 13 at 25 points. MCL 777.43(1)(b). “[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a).

Defendant contends that the record supported a finding of only two offenses against a person. Defendant’s contention is misplaced. The record reveals three crimes against a person that were not used in the scoring of OV 11: (1) the sentencing offense of assault with intent to commit criminal sexual penetration; (2) the offense of inducing a child to engage in sexually abusive activity; and (3) the offense of possessing child sexually abusive material. Furthermore, the offenses represent a “pattern of felonious criminal activity” under MCL 777.43 because they

¹ In reaching a conclusion, we reject defendant’s argument that his sentencing offense, assault with intent to commit criminal sexual penetration, is the equivalent of either first or third-degree criminal sexual conduct.

occurred concurrently to each other. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Accordingly, there was sufficient evidence to support the trial court's scoring decision. See *Steele*, 283 Mich App at 490.

Lastly, defendant argues that OV 4 was erroneously scored. In order to assess ten points under OV 4, the trial court must find that "Serious psychological injury requiring professional treatment occurred." MCL 777.34(a). The statute does not require proof that the victim actually sought treatment. MCL 777.34(2); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). However, psychological treatment sought as the result of abuse can justify a trial court's scoring decision. See *People v Davenport*, 286 Mich App 191, 200; 779 NW2d 257 (2009). Here, the trial court did not err in assessing ten points for OV 4 because the evidence in the record reveals that the victim sought psychological counseling as a result of defendant's actions.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello